Supreme Court, U.S.
FILED
JUL 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2049

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY and DAKOTA, MINNESOTA & EASTERN RAILROAD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE STATE OF SOUTH DAKOTA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

RICHARD A. ALLEN
(Counsel of Record)
ZUCKERT, SCOUTT & RASENBERGER
888 17th Street, N.W.
Washington, D.C. 20006-3959
(202) 298-8660
Attorney for Amicus Curiae
State of South Dakota

July 14, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the exclusive jurisdiction of the Interstate Commerce Commission under 49 U.S.C. § 10901 to authorize the sale of a railroad line and to determine whether or not to impose conditions to protect employees who might be adversely affected by such sales preempts and supersedes rights such employees would otherwise have under the Railway Labor Act to bargain for such protections and to block the consummation of such sales until the bargaining and mediation process provided under the Railway Labor Act has been completed.

2. Whether in any event the Railway Labor Act gives railroad employees a right to bargain about management's decision to sell part of the railroad, or about the effects thereof on employees.

3. Whether, if the Railway Labor Act does give employees the right to bargain about decisions to sell part of the railroad and the employees wish to bargain for contractual benefits that go beyond those set forth in their existing agreements, that Act prevents consummation of the sale until the completion of the bargaining and mediation process.

4. Whether the Norris-LaGuardia Act permits employees to strike in protest of sales of railroads or parts of railroads.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF SOUTH DAKOTA	1
ARGUMENT	3
The Questions Presented by this Case are of Exceptional Importance as to Which the Courts of Appeals are in Conflict	3
CONCLUSION	9

TABLE OF AUTHORITIES

CASES: Page

Burlington Northern Railway Co. v. United Transportation Union, No. 87-2600 (8th Cir. May 31, 1988), petition for rehearing pending.... 9
Dandridge v. Williams, 397 U.S. 271 (1970) 7
Detroit & Toledo Short Line v. Transportation Union, 396 U.S. 142 (1969) 7
Ex Parte No. 392 (Sub-No. 1)—Class Exemption For the Acquisition and Operation of Rail Lines Under 49 U.S.C. § 10901, 1 I.C.C. 2d 810 (1986).. 2
First National Maintenance v. NLRB, 452 U.S. 666 (1981) 5
International Association of Machinists v. Northeast Airlines, 473 F.2d 549 (1st Cir. 1972)..... 5, 6
RLEA v. Guilford Transportation Industries, Inc., petition for certiorari pending, No. 87-1911 5
RLEA v. Pittsburgh & Lake Erie R.R., 831 F.2d 1231 (3d Cir. 1987), petition for certiorari pending, No. 87-1589 ..... 4, 8, 9
RLEA v. Pittsburgh & Lake Erie R.R., 845 F.2d 420 (3d Cir. 1988), petition for certiorari pending, No. 87-1888 .....4, 5, 6, 9
RLEA v. The City of Galveston, Texas, No. 87-6169 (5th Cir. June 23, 1988) 5
United States v. New York Telephone Co., 434 U.S. 159 (1977) 7
United Transportation Union v. St. Paul Depot, 434 F.2d 220 (8th Cir. 1970), *cert. denied*, 401 U.S. 975 (1971) 7

STATUTES:

Interstate Commerce Act, 49 U.S.C. § 10101 et seq. 4
49 U.S.C. § 10505 4
49 U.S.C. § 10901 ..... 4, 5, 8
49 U.S.C. § 11343 5
Railway Labor Act, 45 U.S.C. § 151 *et. seq.* .....*passim*
Norris-LaGuardia Act, 29 U.S.C. § 101 et. seq.....*passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-2049

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY and DAKOTA, MINNESOTA & EASTERN RAILROAD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE STATE OF SOUTH DAKOTA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The State of South Dakota, which filed briefs as amicus curiae in the district court and in the court of appeals, urges this Court to grant the petition for a writ of certiorari in this case to resolve the questions presented by the decision below, which are of the greatest importance and urgency to the nation's railroad system and on which the circuits are in direct conflict.

INTEREST OF SOUTH DAKOTA

South Dakota has a substantial interest in this case and the questions it presents. Adequate rail transportation is vital to South Dakota. The State is one of the

nation's leading agricultural producing states, and the transportation of those products to Eastern and Western markets is and must be principally by rail. South Dakotas' rail lines are also extremely important for the movement of coal across the country. In addition, the State's cement and wood product industries depend on rail transportation to reach many of their markets.

Major bankruptcies and other misfortunes that have plagued the railroad industry in recent years have left South Dakota particularly vulnerable and have necessitated unprecedented efforts by the State to preserve essential rail services. These have included the acquisition and rehabilitation of almost 900 miles of track abandoned by the bankrupt Chicago, Milwaukee, St. Paul and Pacific Railroad, which the Burlington Northern Railroad now operates for the State under lease and operating agreements.

The present case involves the other major rail system in the State. It was formerly owned by the Chicago and North Western Transportation Company ("C&NW") and runs from Rapid City eastward through Brookings, South Dakota, to Winona, Minnesota. In 1986 C&NW agreed to sell and assign their lines, associated branch lines and related trackage rights, totalling 966 miles, to a newly formed company, The Dakota, Minnesota & Eastern ("DM&E"), which is now headquartered in Brookings, South Dakota. The major portion of the lines and trackage rights that were sold are in South Dakota.

South Dakota believes that the sale of this very important line to an entity like DM&E, under the procedures and conditions prescribed by the Interstate Commerce Commission ("ICC") for such sales in *Ex Parte No. 392 (Sub-No. 1)—Class Exemption For the Acquisition and Operation of Rail Lines under 49 U.S.C. § 10901*, 1 I.C.C. 2d 810 (1986), was essential to stem its continuing deterioration and to prevent its ultimate

abandonment. The sale thus not only preserved essential rail service but also saved many jobs that would otherwise have been lost. The State believes that similar transfers in recent years of unprofitable or marginally profitable railroad lines from Class I railroads to new enterprises have saved thousands of other miles of railroad from abandonment and liquidation.

For all these reasons, South Dakota strongly supported the sale of this line to DM&E, and it participated in the district court and in the court of appeals as amicus curiae to oppose petitioner's arguments that the Railway Labor Act required the consummation of the sale to be enjoined. If this Court grants the petition for a writ of certiorari, South Dakota similarly intends to file a brief on the merits as amicus curiae.

ARGUMENT

THE QUESTIONS PRESENTED BY THIS CASE ARE OF EXCEPTIONAL IMPORTANCE AS TO WHICH THE COURTS OF APPEALS ARE IN CONFLICT.

1. This case is one of a number of cases in which petitioner and other railroad unions have sought to invoke provisions of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, to enjoin sales and other transfers of marginally profitable or unprofitable rail lines to new enterprises for the purpose of exacting agreements from the parties to provide employee protective conditions that the ICC has specifically determined not to require in such transactions because they would unduly burden them and thus discourage them. Rail unions have also sought to exact such protective conditions by direct economic action—i.e., striking in protest of such sales—and have contended that the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*, protects such actions from any judicial interference. If rail labor's legal contentions under either the Railway Labor Act or the Norris-LaGuardia Act are sustained, the result will be to preclude the transfer of

many lines such as the line in this case which, if they are not transferred, will eventually be abandoned because of the high labor costs associated with operating them. Indeed, the decisions of the United States Court of Appeals sustaining rail labor's position under the Norris-LaGuardia Act in *RLEA v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231 (3d Cir. 1987), petition for certiorari pending, No. 87-1589 (*"P&LE I"*) and sustaining rail labor's position under the Railway Labor Act in *RLEA v. Pittsburgh & Lake Erie R.R.*, 845 F.2d 420 (3d Cir. 1988), petition for certiorari pending, No. 87-1888 (*"P&LE II"*) have halted virtually all such transfers.

As discussed below, there is a direct conflict among the circuits on these issues which urgently requires this Court's resolution.

2. South Dakota submits that this case and the others cited present four distinct but integrally related issues all of which must be decided by this Court in order fully to resolve the controversy and dispel the uncertainty that is presently stifling the transfer and revitalization of rail lines.

a. The first issue is whether the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.*, and the actions of the ICC approving line sales under 49 U.S.C. § 10901 (or exempting them from such approval under 49 U.S.C. § 10505) and specifically determining not to impose protective conditions for adversely affected employees, preempt or supersede whatever rights employees may have under the Railway Labor Act to seek such protections through bargaining or mediation and to prevent the sale from taking place until the bargaining and mediation process has been completed. Because the ICC has exclusive jurisdiction over such sales and because the Commission determined as a matter of national transportation policy that the imposition of employee protective conditions would impose an undue and often prohibitive cost on line transfers that are very much in the public

interest, the district court and Eighth Circuit in this case concluded that the Interstate Commerce Act does supersede employee's bargaining rights under the Railway Labor Act. Pet. App. 4a-5a. The Third Circuit in *P&LE II* concluded otherwise and accordingly affirmed an injunction against the consummation of a sale, despite that court's awareness of "the unfortunate ramifications and irony of our decision." 845 F.2d at 446. The Fifth Circuit has recently followed the Third Circuit's reasoning in *RLEA v. The City of Galveston, Texas*, 5th Cir. No. 87-6169 (June 23, 1988). This conflict among the Circuits on this important question warrants this Court's review and resolution.[1]

b. A second issue that is common to each of those cases and that is perhaps more fundamental than the ICC preemption issue is whether the Railway Labor Act applies at all to a railroad's decision to sell all or part of its business. South Dakota submits that under this Court's decision in *First National Maintenance v. NLRB*, 452 U.S. 666, 676 (1981) and the First Circuit's decision in *International Association of Machinists v. Northeast Airlines*, 473 F.2d 549 (1st Cir. 1972), the decision to sell a major segment of its business is exclusively man-

---

[1] The decision of the First Circuit in *RLEA v. Guilford Transportation Industries, Inc.*, 1st Cir. No. 87-1774 (decided January 20, 1988) petition for cert. pending, No. 87-1911, presents an issue that is similar to the preemption issue in this case and *P&LE II* and *Galveston*; namely, whether the ICC's exemption of a transaction under 49 U.S.C. § 11343 preempts the bargaining rights of employees under the Railway Labor Act. *Guilford* is nevertheless distinguishable from the present case and from *P&LE II* and *Galveston* in a number of respects, because it involves different statutory provisions—§§ 11343 and 11341 rather than § 10901—and appears to involve fairly unique and non-recurring facts. As RLEA pointed out in its supplemental brief in No. 87-1911 filed June 20, 1988, several recent events have rendered the controversy in that case largely moot. For all those reasons, South Dakota beliefs that this Court's review of the *Guilford* case is not warranted.

agement's decision to make and that employees have no rights under the Railway Labor Act to bargain about that decision, either directly or in the guise of bargaining about its effects. As the First Circuit stated in rejecting the same Railway Labor Act argument advanced by petitioner in this case:

> To allow the Union to force a company to bargain about the effects of its management decisions to the extent of forcing it to forego the proposed change in operations would be in effect to take away from it the freedom to make the decision in the first place. . . . Where it is clear . . . that bargaining about some effects of a decision would be ineffectual unless the company could be required to renegotiate [it], we believe that the duty to bargain about those effects does not arise at all.

International Association of Machinists v. Northeast Airlines, 473 F.2d at 558-559. Accordingly even if the Court concludes that the Interstate Commerce Clause would not supersede the Railway Labor Act on these matters, the judgment below should nevertheless be sustained on the ground that the Railway Labor Act is simply inapplicable.

The Third Circuit in *P&LE II* however, reached the opposite conclusion from the First Circuit in the *Northeast Airlines*, case, and held that "[a] railroad has a duty to bargain over the effects of the transaction prior to implementing its unilateral decision to sell its rail assets." 845 F.2d at 430. This view gives rail labor an effective veto power over such sales and largely nullifies any notion that decisions on these matters are for management alone and are not proper subjects for the collective bargaining process. It is essential that this Court resolve this fundamental issue on which the circuits are in conflict.[2]

---

[2] Although the Eighth Circuit in this case did not discuss this issue, it is nevertheless properly presented by the Eighth Circuit's

3. The third issue presented by the judgment below is whether, even if the sale of a railroad line or the effects thereof are appropriate subjects for bargaining under the Railway Labor Act, that Act prohibits railroad management from consummating a sale until the bargaining and mediation process has been completed. South Dakota submits that the petitioner's theory of the Railway Labor Act in this and other cases stands the scheme of that Act on its head. What petitioner wishes to obtain by bargaining are *new* rights over and above those in their existing agreements. Invoking the Railway Labor Act to block consummation of line sales until the bargaining and mediation process runs its "almost interminable"[3] course does not preserve the status quo but dramatically changes it, contrary to the scheme of the Act. See *United Transportation Union v. St. Paul Depot*, 434 F.2d 220, 223 (8th Cir. 1970), *cert. denied*, 401 U.S. 975 (1971). Again, however, the Third Circuit in *P&LE II* concluded otherwise. 845 F.2d at 428.[4]

4. The fourth issue that the Court needs to resolve is whether the Norris-LaGuardia Act guarantees railroad employees the unfettered right to strike in protest of line

---

judgment because it is an alternative ground for sustaining that judgment. A party may defend a lower court's judgment on any ground that sustains it whether or not the lower court considered that ground or even if it rejected it. *See, e.g., United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977); *Dandridge v. Williams*, 397 U.S. 271, 475 n.6 (1970). This issue was fully briefed by South Dakota and the other parties in both the district court and the court of appeals.

[3] *Detroit & Toledo Short Line v. Transportation Union*, 396 U.S. 142, 149 (1969).

[4] Again, while this issue was not discussed by the court below, it is properly presented by its judgment because it is an alternative ground for affirmance. See n.2, *supra*. The issue was discussed at some length by the Third Circuit in *P&LE II*, which, in South Dakota's submission, misapplied this Court decision in *Detroit & Toledo Short Line v. Transportation Union*, 396 U.S. 142 (1969).

sales for the purpose of exacting protective conditions from their employers. This issue is directly presented by *P&LE I*, petition for cert. pending, No. 87-1589. While this issue is not directly presented by the judgment below, South Dakota submits that it is inextricably related to the issues that are presented and that its resolution by this Court is essential to fully resolve the controversy and uncertainty presently surrounding railroad line sales under 49 U.S.C. § 10901. That is so because even if the Court held that the Interstate Commerce Act superseded the Railway Labor Act in this area or that these matters are not a subject for bargaining under the Railway Labor Act, most such sales would not be feasible if unions were free to strike in order to exact the desired conditions by that means.

The issues under the Norris-LaGuardia Act are inextricably related to those under the Railway Labor Act and Interstate Commerce Act because whether the Norris-LaGuardia Act prohibits judicial interference with strikes depends on whether the strike is one "growing out of any labor dispute." 29 U.S.C. § 104. If disputes about line sales are not proper subjects of collective bargaining, either under the Railway Labor Act itself or because of the preemptive effect of the Interstate Commerce Act, then strikes over such sales would not be ones that grow out of a "labor dispute" within the meaning of the Norris-LaGuardia Act. To conclude that employees may strike over matters they have no right to bargain about with management would frustrate the basic purpose and design the Railway Labor Act to promote industrial peace by defining, in a broad but not unlimited fashion, those subjects about which management must bargain with labor and by carefully prescribing the mechanisms for resolving disputes over those matters.[5]

---

[5] As noted, the Norris-LaGuardia Act issue is directly presented by the Third Circuit's decision in *P&LE I*. In another Eighth Circuit decision which is now subject to a petition for rehearing, the

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

RICHARD A. ALLEN
(Counsel of Record)
ZUCKERT, SCOUTT & RASENBERGER
888 17th Street, N.W.
Washington, D.C. 20006-3959
(202) 298-8660
Attorney for Amicus Curiae
State of South Dakota

July 14, 1988

Eighth Circuit also held that the Norris-LaGuardia Act prohibited an injunction against a strike protesting the sale of a railroad line. *Burlington Northern Railway Co. v. United Transportation Union*, 8th Cir. No. 87-2600 (decided May 31, 1988). Unlike the Third Circuit, however, the Eighth Circuit in the *Burlington Northern* case had also held that employees had no right under the Railway Labor Act to bargain about the effects of such sales. South Dakota submits that the Eighth Circuit's conclusion that employees may strike about something they have no right to bargain about is incorrect. Contrary to the suggestion of the Interstate Commerce Commission, South Dakota submits that this Court should not hold the petitions in this case and in *P&LE I* and *P&LE II* in abeyance pending the Eighth Circuit's decision on the rehearing request. Since the Norris-LaGuardia Act issue is directly presented in *P&LE I* and implicitly in the other cases, the Court should grant the pending petitions and resolve the issues they present without further delay.